Bumi Telecommunication and IT Supply Sdn Bhd v Khairil Anuar bin Ismail & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCVC-194–05 OF 2012

ABDUL RAHMAN SEBLI J

15 NOVEMBER 2013

Customs and Excise — Seizure — Goods not liable to seizure — Seizure and forfeiture of goods — Mobile phones — Plaintiff's certificate of registration as assembler and not importer of complete mobile phone sets — Import permit was to 'import for manufacturing parts only' — Whether plaintiff authorised to import complete sets of mobile phone — Whether importation in breach of condition of import permit — Whether seizure and forfeiture lawful and legal — Whether goods once cleared by proper officer of customs, not liable to seizure — Whether first defendant acted in bad faith in effecting seizure — Whether evidence established to show that the fifth defendant reckless in issuing import permit — Whether negligence of defendants with regard to seizure and detention of goods established — Customs Act 1967 ss 114(1), 125, 126, 132 & 135

The plaintiff was a registered 'assembler of mobile phones'. Relying on an import permit issued by the fifth defendant, the plaintiff imported 4,853 units of mobile phones in complete sets. The importation was approved by a proper officer of customs and the mobile phones were duly released from the customs check point in Johor. However, upon their release, the phones were seized by a team of customs officers led by DW2 and subsequently handed to the first defendant who was assigned to investigate the case. The seizure was made pursuant to s 114(1) of the Customs Act 1967 ('the Act') on suspicion that the mobile phones were imported without permit. According to DW2, at the time of seizure, the indorsement on the copy of the import permit was to 'import for manufacturing parts only', meaning to say to import mobile phone parts only and not complete mobile phone sets. The first defendant served on the plaintiff a notice of seizure of the seized phones. The plaintiff applied in writing for their release but was refused by the first defendant, hence the filing of the present suit by the plaintiff claiming, inter alia, compensation. The plaintiff's claim against the defendants was grounded on negligence. As against the first, second and third defendants the alleged negligent acts, inter alia, was the failure to heed that the importation of the mobile phones was approved and released from customs control by a proper officer of customs. The claim against the fourth defendant was for vicarious liability for the acts of the second and third defendants, the Director of Customs Perak and Director-General of Customs respectively. As against the fifth defendant, the allegation was that it was

reckless in issuing the import permit which induced the plaintiff into importing complete mobile phone sets instead of mobile phone parts.

Held, dismissing the plaintiff's claim with costs:

(1) The plaintiff's permit was to import mobile phone parts but in this case it imported complete mobile phone sets. The importation was therefore in breach of a condition of the import permit. This provided sufficient cause for the first defendant to seize the goods, to issue the seizure notice and to detain the goods. The plaintiff only applied for the relevant permit one week after the notice of seizure was issued, which goes to confirm the first defendant's suspicion that the plaintiff had no permit to import complete mobile phone sets at the point of importation (see para 8).

(2) What the plaintiff's contention amounted to was that once goods have been cleared for importation by a proper officer of customs, they were not liable to seizure. There was only half truth to the argument. It would be a valid proposition if the importation did not contravene any law relating to importation of goods. If the importation was otherwise in breach of the Act or any regulation made thereunder, no act on the part of any proper officer of customs in releasing the goods could regularised the importation. The fallacy of the plaintiff's argument was that it ignored the possibility that the goods might have been released inadvertently, or by mistake, or even intentionally by the proper officer of customs. If the plaintiff's argument were to be accepted as correct law, it would mean that contraband that were intentionally, inadvertently or mistakenly released for importation by a proper officer of customs would not be liable to seizure. That cannot be the purpose behind s 114(1) of the Act (see paras 12–13).

(3) The fifth defendant's duty was to process the plaintiff's application for importation of manufacturing parts based on the plaintiff's certificate of registration as an assembler and not as importer of complete mobile phone sets. It was undisputed that the plaintiff had no other certificate of registration other than a certificate of registration as an assembler of mobile phones. The plaintiff could not therefore be heard to say that it was authorised to import complete mobile phone sets as was done in this case (see para 15).

(4) Even if it was the duty of the fifth defendant to verify the particulars in the import permit before issuing it to the plaintiff, it was still the duty of the plaintiff at the time of importation to quote the correct tariff code in the import declaration forms. The tariff code must correspond with the right category or class of goods that the plaintiff was allowed to import. It was an offence to make an incorrect declaration (s 133(1)(a)). Therefore, it behooved the plaintiff to make sure that the correct particulars were filled

in the import declaration forms at the point of importation, or risked seizure, forfeiture and even prosecution (see paras 16–17).

(5) Since the plaintiff had no valid permit to import mobile phones, there was no question of negligence on the part of any of the defendants with regard to the seizure and detention of the goods. There was no evidence that the first defendant had acted in bad faith in effecting seizure and there was no evidence either to show that the fifth defendant had been reckless in issuing the import permit with the relevant customs tariff code numbers. The plaintiff's claim against all five defendants must therefore be dismissed with costs (see para 18).

[Bahasa Malaysia summary

Plaintif merupakan 'pemasang telefon mudah alih' berdaftar. Bergantung kepada satu permit import yang dikeluarkan oleh defendan kelima, plaintif mengimport 4,853 unit lengkap telefon mudah alih. Pengimportan tersebut diluluskan oleh pegawai kastam yang bertugas dan telefon-telefon mudah alih tersebut dilepaskan sewajarnya daripada pemeriksaan kastam di Johor. Walau bagaimanapun, selepas pelepasan tersebut, telefon-telefon tersebut disita oleh sepasukan pegawai kastam yang diketuai oleh DW2 dan kemudiannya diserahkan kepada defendan pertama yang diarahkan untuk menyiasat kes. Penyitaan dibuat menurut s 114(1) Akta Kastam 1967 ('Akta') atas keraguan bahawa telefon mudah alih tersebut diimport tanpa permit. Menurut DW2, pada masa penyitaan, pengendorsan pada salinan permit import adalah untuk 'import bagi bahagian-bahagian pembuatan sahaja', bermaksud mengatakan untuk mengimport bahagian-bahagian telefon mudah alih sahaja dan bukannya set-set lengkap telefon mudah alih. Defendan pertama menyerahkan notis penyitaan telefon-telefon yang dirampas kepada plaintif. Plaintif memohon secara bertulis untuk pelepasan telefon tersebut tetapi dinafikan oleh defendan pertama, oleh itu guaman ini difailkan oleh plaintif mendakwa, antara lainnya, ganti rugi. Tuntutan plaintif terhadap defendan-defendan berasaskan kecuaian. Tindakan kecuaian yang didakwa terhadap defendan pertama, kedua dan ketiga, antara lainnya, adalah kegagalan untuk mematuhi bahawa pengimportan telefon mudah alih diluluskan dan dilepaskan daripada kawalan kastam oleh pegawai kastam bertugas. Tuntutan terhadap defendan keempat ialah untuk liabiliti vikarius untuk tindakan defendan kedua dan ketiga, Pengarah Kastam Perak dan Ketua Pengarah Kastam masing-masing. Dakwaan terhadap defendan kelima adalah bahawa defendan kelima bertindak melulu dalam mengeluarkan permit import yang mendorong plaintif untuk mengimport set-set telefon mudah alih lengkap bukannya bahagian-bahagian telefon mudah alih.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Permit plaintif ialah untuk mengimport bahagian-bahagian telefon mudah alih tetapi di dalam kes ini plaintif mengimport set-set telefon

mudah alih. Pengimportan tersebut oleh itu melanggar syarat permit import. Ini memberikan alasan mencukupi untuk defendan pertama menyita barangan, untuk mengeluarkan notis penyitaan dan menahan barangan tersebut. Plaintif hanya memohon untuk permit berkenaan seminggu selepas notis penyitaan dikeluarkan, yang mengesahkan keraguan defendan pertama bahawa plaintif tidak mempunyai permit untuk mengimport set-set lengkap telefon mudah alih pada masa pengimportan (lihat perenggan 8).

(2) Apa yang didakwa plaintif adalah apabila barangan tersebut dilepaskan untuk pengimportan oleh pegawai kastam bertugas, barangan tersebut tidak bertanggungan untuk disita. Terdapat separuh kebenaran di dalam hujahan tersebut. Hujahan tersebut akan menjadi sah sekiranya pengimportan tidak melanggar mana-mana undang-undang berkenaan pengimportan barangan. Sekiranya pengimportan tersebut melanggar Akta atau mana-mana peraturan yang dibuat di bawahnya, tiada tindakan di bahagian mana-mana pegawai kastam bertugas dalam melepaskan barangan boleh membenarkan pengimportan. Kegagalan hujahan plaintif adalah bahawa dia tidak mengendahkan kemungkinan bahawa barangan tersebut mungkin dilepaskan secara tidak disengajakan, atau melalui kesilapan, atau secara sengaja oleh pegawai kastam bertugas. Sekiranya hujahan plaintif diterima sebagai undang-undang yang tepat, ini bermakna bahawa penyeludupan secara sengaja, tidak disengajakan atau tersilap dilepaskan oleh pegawai kastam bertugas tidak bertanggungan untuk disita. Ini bukanlah tujuan di sebalik s 114(1) Akta (lihat perenggan 12–13).

(3) Kewajipan defendan kelima ialah untuk memproses permohonan plaintif untuk pengimportan bahagian-bahagian pemasangan berdasarkan sijil pendaftaran plaintif sebagai seorang pemasang dan bukannya seorang pengimport set lengkap telefon mudah alih. Tidak dipertikaikan bahawa plaintif tidak mempunyai sijil pendaftaran selain daripada satu sijil pendaftaran sebagai seorang pemasang telefon mudah alih. Plaintif oleh itu tidak boleh dibenarkan mengatakan bahawa ia diberi kuasa untuk mengimport set lengkap telefon mudah alih seperti yang dilakukan di dalam kes ini (lihat perenggan 15).

(4) Walaupun ianya adalah kewajipan defendan kelima untuk memastikan butiran-butiran di dalam permit import sebelum mengeluarkannya kepada plaintif, namun adalah kewajipan plaintif pada masa pengimportan untuk menyatakan kod tarif yang tepat di dalam borang deklarasi import. Kod tarif mestilah sepadan dengan kategori yang betul atau pengkelasan barang yang plaintif dibenarkan untuk mengimport. Adalah satu kesalahan untuk membuat deklarasi tidak tepat (s 133(1)(a)). Oleh itu, ia terletak ke atas plaintif untuk memastikan bahawa butiran-butiran tepat diisi di dalam borang deklarasi import

pada masa pengimportan, atau menerima risiko penyitaan, rampasan dan juga pendakwaan (lihat perenggan 16–17).

(5) Memandangkan plaintif tidak mempunyai permit sah untuk mengimport telefon mudah alih, tiada persoalan mengenai apa-apa kecuaian bagi di pihak defendan berhubung penyitaan dan penahanan barang-barang tersebut. Tiada bukti bahawa defendan pertama bertindak dengan niat jahat bagi mengakibatkan penyitaan dan tiada bukti untuk menunjukkan bahawa defendan kelima bertindak melulu dalam mengeluarkan permit import dengan nombor kod tarif kastam berkenaan. Tuntutan plaintif terhadap kelima-lima defendan oleh itu perlu diketepikan dengan kos (lihat perenggan 18).]

Notes

For a case on goods not liable to seizure, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 218.

Legislation referred to

Customs Act 1967 ss 114(1), 125, 126, 132, 133(1)(a), 135(1)(g)

R Ravendran (JR Ravendran & Assoc) for the plaintiff.
Lee Chee Thim for the first and fourth defendants.
Muhammad Azrul Abdul Hamid (Boo Min Lee with him) (Wong Jin Nee & Teo) for the fifth defendant.

Abdul Rahman Sebli J:

THE FACTS

[1] The plaintiff is a registered 'Assembler of Mobile Phones'. On 12 November 2011, relying on an import permit issued by the fifth defendant, the plaintiff imported 4853 units of mobile phones in complete sets. The importation was approved by a proper officer of customs and the mobile phones were duly released from the customs check point at Kompleks Kastam Sultan Abu Bakar, Tanjung Kupang, Gelang Patah, Johor. However upon their release the phones were seized by a team of customs officers led by customs officer Zain Azman bin Mohamad ('DW2') and subsequently handed to the first defendant who was assigned to investigate the case. The seizure was made pursuant to s 114(1) of the Customs Act 1967 ('the Act') on suspicion that the mobile phones were imported without permit. According to DW2, at the time of seizure the indorsement on a copy of the import permit was to 'Import for manufacturing parts only', meaning to say to import mobile phone parts only and not complete mobile phone sets. Section 114(1) provides as follows:

A All goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons net registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters.

[2] On 23 November 2011 the first defendant served on the plaintiff a notice of seizure for 4790 of the 4853 units of seized phones. The plaintiff applied in writing for their release but was refused by the first defendant, hence the filing of the present suit by the plaintiff, claiming, inter alia, for the following reliefs:

(a) compensation for a sum of RM3m;

(b) general damages; and

(c) exemplary damages against the first, second and third defendants for abuse of power in relation to the seizure of the mobile phones.

[3] The plaintiff's claim against the defendants is grounded on negligence. As against the first, second and third defendants the alleged negligent acts are as follows:

(a) failing to heed that the importation of the 4790 units of mobile phones was approved and released from customs control by a proper officer of customs;

(b) failing to heed that the importation of the 4790 units of mobile phones had been classified under customs Tariff Code No 51712000 by a proper officer of customs;

(c) failing to heed that the import permit for the 4790 units of mobile phones had been approved and issued by the fifth defendant before the importation; and

(d) failing to heed that the 4790 units of mobile phones had been correctly declared by the plaintiff and which had been approved as correct by a proper officer of customs.

[4] The claim against the fourth defendant is for vicarious liability for the acts of the second and third defendants, the Director of Customs Perak and Director-General of Customs respectively. As against the fifth defendant the allegation is that it was reckless in issuing the import permit with customs tariff

code No 851712000 which induced the plaintiff into importing complete mobile phone sets instead of mobile phone parts which comes under Customs Tariff Code No 852990900. The particulars of the fifth defendant's alleged negligence which the plaintiff described as 'Misrepresentation' in the statement of claim are as follows:

(a) failing to heed that at all material times it had approved the import permit in respect of the importation of the mobile phones in the form of complete and incomplete sets;

(b) failing to heed that at all material times prior to 16 November 2010 it had approved the import permit to import mobile phones using the supplier's TAC under the Customs Tariff Code No 852990900;

(c) failing to heed that at all material times ever since 16 November 2010 it had approved the import permit to import mobile phones in complete sets including the seized mobile phones using the supplier's TAC under the customs tariff code No 851712000;

(d) failing to heed that it had through an audit inspection done on 27 December 2010 at the plaintiff's premises verified and approved that the plaintiff had lawfully imported the mobile phones with valid import permits as approved by it; and

(e) failing to heed that at all material times it had approved the label requisition by the plaintiff in respect of the mobile phones seized by the first defendant.

CASE AGAINST THE FIRST TO FOURTH DEFENDANTS

[5] The issue in relation to the first to fourth defendants is whether the first defendant was justified by law in issuing the seizure notice and in refusing to return the seized mobile phones to the plaintiff. The law as encapsulated in s114(1) of the Act envisages four situations where goods may be seized by a customs officer, namely:

(a) where there has been committed an offence under the Act or any regulation made thereunder;

(b) where there has been a breach of the provisions of the Act or any regulation made thereunder;

(c) where there has been a breach of any restriction or condition subject to or upon which any licence or permit has been granted;

(d) where there is reasonable cause to suspect any of the above transgressions.

[6] The first to fourth defendants are relying on situation (4) to justify seizure of the mobile phones. Reasonable cause to suspect as the term implies means reasonable suspicion and must not be confused with actual proof of the commission of an offence. Such proof will only be required if there is a prosecution against any person or where there is an inquiry (for purposes of forfeiture) in respect of the goods seized. All that the law requires is for the seizing officer to show that his suspicion is reasonable and probable. He must of course act in good faith for bad faith negates reasonableness.

[7] It is important to note that under the Act all goods liable to seizure are liable to forfeiture (s 126) and that an order for forfeiture shall be made if it is proved to the satisfaction of the court that an offence against the Act or any regulation made thereunder has been committed in respect of the goods, irrespective of whether any person may have been convicted of such offence (s 125). Section 132 further provides that no costs of damages arising from such seizure is recoverable unless it can be shown that the seizure was done without reasonable or probable cause. Thus, to entitle the plaintiff to damages it must be shown that the first to fourth defendants had acted without reasonable or probable cause in seizing the mobile phones. The issue of negligence does not arise as the seizure was intentional. Intention is the antithesis of a negligent act.

[8] Was there reasonable or probable cause for the first defendant to suspect that the mobile phones were the subject of a customs offence? On the evidence I have no doubt that there was. The plaintiff's permit was to import mobile phone parts but in this case it imported complete mobile phone sets. The importation was therefore in breach of a condition of the import permit. This provides sufficient cause for the first defendant to seize the goods, to issue the seizure notice and to detain the goods. The fact that the plaintiff had been acquitted by the magistrate's court in a prosecution for an offence under s 135(1)(g) of the Act in respect of the goods is irrelevant. In any case the prosecution is appealing to the High Court against both the order of acquittal and the order for the return of the goods to the plaintiff. Nor is it relevant that prior to 12 November 2011 (prior to 16 November 2010 according to counsel) the proper officer of customs had approved the importation of 'complete-set' mobile phones under customs Tariff Code No 851712000.

[9] The evidence of the investigating officer (the first defendant) which I accept is that the plaintiff was asked to produce the import permit for the 4790 units of mobile phones that it imported but the plaintiff failed to do so. What the plaintiff did instead was to produce 39 sets of e-import permits belonging to two unrelated companies, namely Zitron Enterprise (M) Sdn Bhd and Midland Network Sdn Bhd. Obviously these e-permits were not valid for importing the mobile phones. It is like producing another person's boarding

pass to board a plane. The plaintiff only applied for the relevant permit one week after the notice of seizure was issued, which goes to confirm the first defendant's suspicion that the plaintiff had no permit to import the 4790 units of complete mobile phone sets at the point of importation.

[10] It was however argued that this part of the first defendant's evidence ought to be expunged from the record as it was not pleaded. With due respect I see nothing in the argument. There is no rule to say that the defendant must plead all material facts that he intends to rely on in his defence. If the rule were otherwise a defendant would have to plead or disclose his entire evidence before trial. What is required of the defendant is to traverse material assertions made by the plaintiff in the statement of claim.

[11] He is not required to plead in his defence something which the plaintiff does not even allege against him, unless he is required by law to plead a specific defence. In the present case it is not part of the plaintiff's pleaded case that the first defendant did not ask for the import permit. There is therefore no requirement for the first to fourth defendants to plead in the negative that the plaintiff failed to produce the import permit when asked to do so by the first defendant. Given the burden of proof, which is on the plaintiff to show that it had a valid permit to import the 4790 mobile phone sets, it is sufficient for the first to fourth defendants to put the plaintiff to strict proof thereof. The rest is a matter of evidence.

BASIS OF THE PLAINTIFF'S CLAIM AGAINST THE FIRST TO FOURTH DEFENDANTS

[12] The whole basis of the plaintiff's claim against the first to fourth defendants is that since the mobile phones had been cleared for importation by a proper officer of customs it was wrong for the first defendant to seize them. What the plaintiff's contention amounts to is that once goods have been cleared for importation by a proper officer of customs, they are not liable to seizure. There is only half truth to the argument. It would be a valid proposition if the importation does not contravene any law relating to importation of goods. If the importation is otherwise in breach of the Act or any regulation made thereunder, no act on the part of any proper officer of customs in releasing the goods could regularise the importation.

[13] The fallacy of the plaintiff's argument is that it ignores the possibility that the goods might have been released inadvertently, or by mistake, or even intentionally by the proper officer of customs. In this case the proper officer of customs (PW3) who released the goods admitted that he did not know if the plaintiff had a certificate of registration to import complete mobile phone sets. He said he had only been on the job for one year on 12 November 2011. If the

plaintiff's argument were to be accepted as correct law, it would mean that contraband that are intentionally, inadvertently or mistakenly released for importation by a proper officer of customs would not be liable to seizure. That cannot be the purport behind s 114(1) of the Act. In fact it will defeat that purpose.

CASE AGAINST THE FIFTH DEFENDANT

[14] The issue in so far as the fifth defendant is concerned is whether it had as a matter of fact issued the plaintiff with a permit to import the 4790 sets of mobile phone. In this regard I must say at the outset that the plaintiff's own evidence shows that the fifth defendant never did. The plaintiff's manager (PW1) was asked in cross-examination if the plaintiff had been issued with such permit and her initial answer was that she had no knowledge. She then explained that the plaintiff had written a letter to the fifth defendant informing the fifth defendant that it was applying for a permit. Despite having only submitted an application for permit, PW1 insisted that the plaintiff had a permit to import the seized mobile phones. When challenged to produce the permit, she produced a permit for importing mobile phone parts and claimed that she did not know if the plaintiff needed a certificate of registration to import mobile phones in complete sets. This is the sorry state of the plaintiff's case against the fifth defendant. On the evidence and by PWTs own admission it is clear that the plaintiff had no permit to import the seized goods.

[15] The plaintiff's assertion that the fifth defendant had confused it by validating the customs Tariff Code No 851712000 as approved in the import permit is nothing more than a ruse to implicate the fifth defendant and to avoid confiscation. DW3 has explained that the fifth defendant is not concerned with the customs tariff codes in approving import permits. The codes are only for the purpose of determining whether the goods are taxable or otherwise. The fifth defendant's duty was to process the plaintiff's application for importation of manufacturing parts based on the plaintiff's certificate of registration as an assembler and not as importer of complete mobile phone sets. It is undisputed that the plaintiff had no other certificate of registration other than a certificate of registration as assembler of mobile phones. The plaintiff cannot therefore be heard to say that it was authorised to import complete mobile phone sets as was done in this case.

[16] Even if it was the duty of the fifth defendant to verify the particulars in the import permit before issuing it to the plaintiff, it was still the duty of the plaintiff at the time of importation to quote the correct tariff code in the import declaration forms. The tariff code must correspond with the right category or class of goods that the plaintiff was allowed to import. In this case the customs tariff code that the plaintiff declared in the import declaration

form was code No 851712000 which refers to complete mobile phone sets and not mobile phone parts. The declaration was therefore incorrect vis-a-vis the import permit.

[17] The plaintiff cannot blame anyone but itself if the declaration turned out to be incorrect. As an importer the plaintiff should know that it is an offence to make an incorrect declaration (s 133(1)(a)). It is a strict liability offence, punishable with a fine not exceeding RM500,000 or to imprisonment for a term not exceeding five years or to both punishments. Therefore it behoved the plaintiff to make sure that the correct particulars were filled in the import declaration forms at the point of importation, or risked seizure, forfeiture and even prosecution.

CONCLUSION

[18] Since the plaintiff had no valid permit to import the 4790 sets of mobile phones, there is no question of negligence on the part of any of the defendants with regard to the seizure and detention of the goods. There is no evidence that the first defendant had acted in bad faith in effecting seizure and there is no evidence either to show that the fifth defendant had been reckless in issuing the import permit with the relevant customs tariff code numbers. The plaintiff's claim against all five defendants must therefore be dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed